IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
OXFORD DIVISION

CLARENCE COCROFT and TRU SOURCE MEDICAL CANNABIS, LLC *Plaintiffs*, v. CHRIS GRAHAM, in his official capacity as the Commissioner of the Mississippi Department of Revenue, RILEY NELSON, in his official capacity as Chief of Enforcement of the Mississippi Alcoholic Beverage Control Bureau and DR. DANIEL P. EDNEY, in his official capacity as State Health Officer for State of Mississippi Department of Health, *Defendants.*	Civil Action No. 3:23-cv-00431-MPM-JMV

PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Defendants prohibit speech about medical cannabis in Mississippi, even while acknowledging that "medical cannabis is legal under Mississippi law." Defs.' Mem. 6. This censorship is constitutionally permissible, Defendants argue, because a separate sovereign, the federal government—whose laws Defendants are not empowered to enforce—technically still criminalizes that same enterprise.

But the First Amendment question in this case is not, over-simplistically, whether medical marijuana is still illegal under federal law. (It is, sort of.) More precisely, rather, the question is whether a state agency in Mississippi can lash its regulatory authority to that of another jurisdiction, and then channel that *other* jurisdiction's laws to justify prohibiting speech it could not otherwise prohibit. And the answer to *that* question is no: A state's power to restrict speech related to certain commercial transactions is, quite sensibly, limited to instances when the state itself has outlawed those transactions. And the licensed dispensation of medical marijuana is legal in Mississippi. So, it follows, Mississippi's regulators cannot prohibit licensed dispensaries in Mississippi from advertising medical marijuana, notwithstanding the federal government's (ever-loosening) prohibition of that conduct.

Defendants ask this Court to accept a novel position—that a state agency may burden a fundamental constitutional right, so long as that burden relates to conduct that is vaguely prohibited under federal law. That is so, Defendants argue, even though Defendants lack any authority to enforce that prohibition. But this argument is doctrinally unprecedented and, were this Court to accept it, would lead to a bizarre rule of law. Defendants' motion should be denied.

ADDITIONAL FACTS AND BACKGROUND

Defendants do not dispute that medical marijuana dispensaries in Mississippi "are prohibited from advertising and marketing in any media." *See* Compl. ¶ 29 (citing Code Miss. R. 15-22:3.2.1). Defendants instead stress the fact that Plaintiffs are not fully foreclosed from having basic signage, or doing things like listing themselves in a business directory or phonebook. Defendants omit, however, that such "permissions" to advertise exist only in light of a statutory prohibition on any attempt by Defendants to regulate them. *See* Miss. Code Ann. §§ 41-137-41(1)(d)(x). Again, to the extent that the Mississippi Department of Health was afforded the authority to regulate medical marijuana advertising, it has prohibited it entirely. *See* Compl. ¶ 32 (citing Code Miss. R. 15-22:3.2.1; Miss. Code Ann. § 41-137-41(1)(d)(x)). That is the crux of this challenge.[1]

Plaintiffs Clarence Cocroft and Tru Source Medical Cannabis ("Plaintiffs" or "Clarence") comply with all state laws. *See* Compl. ¶¶ 2–3, 58–60, 65–66, 68–70. Clarence's facility has been surveyed, approved and inspected. *Id*. ¶¶ 64–65, 95, 98. Plaintiffs possess a state-issued medical cannabis license that is active, has never lapsed, and the business remits the appropriate taxes to the state of Mississippi—which dutifully accepts and processes them. *Id*. ¶¶ 2–3, 69–70.

But all of this—literally *all of it*—say Defendants, is illegal under federal law. *See* Defs.' Mem. 6–9. This, even as the federal government has all but fully disavowed its own supposed prohibition. Indeed, the federal government has declared—first in 2014 and every year since—that it would not expend any funds prosecuting state-legal medical marijuana operations. *See* Compl. ¶ 13 (citing *United States v. McIntosh*, 833 F.3d 1163, 1175–77 (9th Cir. 2016)

[1] Plaintiffs do not challenge the aspects of Defendants' advertising restrictions to the extent they largely mirror the limits on tobacco or alcohol advertising—restrictions on things like advertising to children or promoting overconsumption. *See* Compl. ¶ 48 (referencing Code Miss. R. 15-22:3.2.2).

(discussing the Rohrabacher-Farr Amendment)). And just recently, President Biden issued blanket pardons for small-time marijuana possession or marijuana use.[2] It is in this context that the state of Mississippi asserts its authority to regulate speech—that is, solely in reliance on a federal law that Congress has said it will not enforce against Plaintiffs and on the heels of a blanket pardon absolving all of its customers.

ARGUMENT

Plaintiffs' response proceeds in two parts. First, Plaintiffs explain why dismissal is improper on the basis of Defendants' primary argument—that Plaintiffs' speech is unprotected by the First Amendment because marijuana is illegal under federal law and Plaintiffs therefore fail the first prong of *Central Hudson*. And second, Plaintiffs explain why Defendants' other argument—that this Court lacks the power to rule for Plaintiffs because it would facilitate conduct that is illegal under federal law—is also wrong.

I. BECAUSE TRU SOURCE MEDICAL CANNABIS IS A LEGAL BUSINESS UNDER MISSISSIPPI LAW, THE FIRST AMENDMENT'S COMMERCIAL SPEECH PROTECTIONS APPLY.

Defendants do not contend that Plaintiffs' desired messaging is not commercial speech. *See* Defs.' Mem. 6. Their contention, rather, is that Plaintiffs' commercial speech is not worthy of protection under the First Amendment. Plaintiffs' argument in response is twofold. First, Defendants' top-line legal theory—that it may ban speech related to a state-legal business because an unenforced federal statute forbids that activity—is doctrinally wrong. And second, even if marijuana's prohibition under federal law were relevant, it is simply incorrect to suggest

[2] *See* Proclamation No. 10688, 88 Fed. Reg. 90083 (Dec. 22, 2023), available at https://www.whitehouse.gov/briefing-room/presidential-actions/2023/12/22/a-proclamation-on-granting-pardon-for-the-offense-of-simple-possession-of-marijuana-attempted-simple-possession-of-marijuana-or-use-of-marijuana/.

that the Controlled Substances Act (CSA) justifies state regulations that violate the U.S. Constitution.

A. THE FIRST PRONG OF *CENTRAL HUDSON* ASKS WHETHER A PROPOSED TRANSACTION IS LEGAL UNDER THE LAWS OF THE JURISDICTION WHERE IT IS PROPOSED, NOT WHETHER IT IS *ILLEGAL* UNDER THE LAWS OF ANOTHER.

The first prong of the *Central Hudson* test asks, as Defendants correctly point out, whether the commercial speech "concern[s] lawful activity." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980). And Clarence's desired speech *does* concern lawful activity in Mississippi. He has a government-issued license that says so. *See* Compl. ¶¶ 2–3, 69–70. That Clarence complies with Mississippi law matters, because, traditionally, the scope of advertising that a state may restrict is limited to "advertising [that] . . . encourages activities which are otherwise crimes under [that state's] law." *Casbah, Inc. v. Thone*, 651 F.2d 551, 564 (8th Cir. 1981); *see also Katt v. Dykhouse*, 983 F.2d 690, 695 (6th Cir. 1992) ("A state or municipality may . . . ban a particular type of commercial transaction within its borders. *Once it has done so*, speech proposing or facilitating the unlawful transaction may be banned without offending the First Amendment." (emphasis added)). In other words, a state government can restrict commercial speech, but only *as incident to* a state-law prohibition on the transaction the speech proposes. But Mississippi has not made medical marijuana illegal; it has, of course, done the opposite. And because of that, Defendants cannot point to any laws on their books to justify their prohibition on advertising it.

Defendants' argument thus rests entirely on the federal Controlled Substances Act. And sure, under the first prong of *Central Hudson*, the *federal* government might successfully rely on that *federal* law to defend a *federal* ban on speech advertising medical marijuana. Here, however, Defendants assert a similar claim of authority, arguing that state agencies in Mississippi may,

without any judicial cause for concern, exercise the same power as Congress and the DEA.[3] But as the Supreme Court has made clear, the First Amendment analysis focuses on whether a transaction is legal *under the laws of the state where it is proposed*, not whether it is illegal under the laws of *another* jurisdiction. *Bigelow v. Virginia*, 421 U.S. 809 (1975) (striking down a ban on abortion-related advertisements in Virginia, as applied to a plaintiff advertising abortion services in New York, where abortion was legal); *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Worcester*, 851 F. Supp. 2d 311, 315 (D. Mass. 2012) (interpreting Supreme Court precedent "to mean that an activity is 'lawful' under the *Central Hudson* test so long as it is lawful where it will occur"). Very simply, "the advertiser who proposes a transaction in a state where the transaction is legal is promoting legal activity. Its speech deserves First Amendment protection." *Wash. Mercantile Ass'n v. Williams*, 733 F.2d 687, 691 (9th Cir. 1984) (applying *Central Hudson*). And such a view reflects the Supreme Court's clear admonition on this point—that a state "may not, under the guise of exercising *internal* police powers," encumber speech "about an activity that is legal" elsewhere. *Bigelow*, 421 U.S. at 824–25 (emphasis added).

This case, therefore, is not the doctrinal lay-up that Defendants cast it as. In fact, one of the only courts to have addressed this question held that plaintiffs had *satisfied* the first prong of

[3] Taken to its logical endpoint, Defendants' argument indeed assumes that Mississippi may also ban advertisements from medical marijuana dispensaries in *other* states, since its argument under *Central Hudson* would be the same—that it can ban speech on promoting any transaction that is unlawful under federal law. This is a dubious proposition. *See New England Accessories Trade Ass'n, Inc. v. City of Nashua*, 679 F.2d 1, 3–4 (1st Cir. 1982) ("If New York, or some other state, decided to legalize the sale and use of marijuana, [another state] would have greater difficulty under *Bigelow* prohibiting an advertisement that the Big Apple was the place to [buy and sell] marijuana."). At least one court has recognized the problem with Defendants' argument in light of *New England Accessories*, and in a nearly identical context. Discussing the First Circuit's hypothetical, that court explained that "[i]t follows that, where one state could not avoid *Central Hudson* scrutiny for banning advertisement of Washington recreational marijuana, neither can the State here avoid *Central Hudson* scrutiny on the basis that recreational marijuana is still illegal under federal law." *Plausible Products, LLC v. Wash. State Liquor & Cannabis Bd.*, Case No. 19-2-03293-6 SEA, slip op. at 10 (Wash. Super. Ct. Nov. 18, 2019), available at https://www.gleamlaw.com/wp-content/uploads/2021/02/FINALORDER.pdf. Thus, the court held, "*Central Hudson* applies to the question under the U.S. Constitution's First Amendment." *Id*. at 6.

Central Hudson in light of any case law suggesting otherwise: "There does not appear to be binding case law explicitly holding that advertising for activity that is legal under state law and illegal under federal law is 'lawful' for the purpose of the *Central Hudson* test." *Seattle Events v. State*, 512 P.3d 926, 934 (Wash. Ct. App. 2022). Even noting the absence of clear precedent, the court in *Seattle Events* reached its conclusion because it accepted, as a starting point, that "existing case law support[ed] extending constitutional protections to advertising for activities *that are legal in the state where the transaction would occur*." *Id*. at 935 (emphasis added). This Court should therefore conclude, for the same reason as in *Seattle Events*, that "marijuana advertising from licensed retailers in [Mississippi] concerns lawful activity," *id*., under prong one of *Central Hudson*.[4]

The court in *Seattle Events* declined to follow the case Defendants mainly rely on, *Montana Cannabis Industry Ass'n v. State*, 368 P.3d 1131 (Mont. 2016). *See* Defs.' Mem. 8. That makes sense, as the court in *Montana Cannabis* was generally unconcerned with whether medical marijuana was legal *in Montana*. Like Defendants here, the court seized on marijuana's *federal* illegality, relying primarily on federal Commerce Clause and Supremacy Clause cases—not free-speech precedent. With that backdrop, it quickly concluded that plaintiffs failed *Central Hudson*'s first prong because, as Defendants have argued here, medical marijuana is illegal under federal law. *Montana Cannabis*, 368 P.3d at 1150.

Seattle Events provides a more thorough discussion of the relevant doctrinal question. Indeed, in rejecting *Montana Cannabis*, the court in *Seattle Events* acknowledged the federal ban, but took its analysis a layer deeper. It explained that the driving concern of *Central*

[4] Defendants do not contend, thus far, that Plaintiffs cannot prevail under the remaining *Central Hudson* factors. Accordingly, this case should proceed to discovery so that the parties can address the remaining prongs on summary judgment.

Hudson's first prong is, again, whether a transaction is legal under the laws of the *state* where it was proposed—not whether it is illegal under the laws of another jurisdiction. *Seattle Events*, 512 P.3d at 934 (citing speech cases). That is Plaintiffs' argument here—and this Court should adopt it, over *Montana Cannabis*, for the same reason.[5]

B. EVEN IF MARIJUANA'S LEGAL STATUS UNDER FEDERAL LAW WERE CONTROLLING, THE FEDERAL GOVERNMENT'S "HALF-IN, HALF-OUT" PROHIBITION OF MARIJUANA WOULD NOT RESOLVE THIS CASE.

Defendants argue that the federal government's prohibition on medical marijuana is the beginning and end of the inquiry. Except the federal "prohibition" is hardly that. As the court in *Good Day Farm Arkansas* acknowledged, "[i]n one public [l]aw, Congress exempts 47 states [including Mississippi], the District of Columbia, and [four] possessions from the very 'illegality' regarding medical marijuana to which the Defense refers." *Good Day Farm Arkansas*, slip op. at 3 (citing the Rohrabacher-Farr Amendment). It is largely for this reason that the federal government's "once comprehensive" approach to marijuana can be more aptly described as a "half-in, half-out regime" that in fact partially "tolerates . . . local use of marijuana." *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2237 (2021) (Thomas, J., statement

[5] To date, Plaintiffs are aware of only one other court to have been asked, like this one, to select between *Seattle Events* and *Montana Cannabis*. And in that case, the court agreed with Plaintiffs' view here—that *Seattle Events* has the better of the analysis. *See Good Day Farm Ark., LLC v. State*, Case No. 60CV-22-931 (Ark. Cir. Ct. Dec. 27, 2023), available at https://arktimes.com/wp-content/uploads/2023/12/Chip-Welch-Good-Day-Order.pdf.). Notably, the court rejected the defendants' argument—which is identical to Defendants' argument here—on the same grounds that Plaintiffs advocate here. That is, the court focused on the fact that *Central Hudson*'s first prong "extend[s] constitutional protections to advertising for activities that are legal in the state where the transaction would occur." Slip op. at 3 (quoting *Seattle Events*). Ultimately, there is simply no controlling case that says what Defendants' position essentially requires this Court to accept—that "federal law controls whether Plaintiffs' proposed commercial speech concerns lawful activity." Defs.' Mem. 8. Instead, as the Court in *Seattle Events* acknowledged, that remains an open question. And "[i]n areas of doubt and conflicting considerations, it is thought better to err on the side of free speech." *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977).

respecting denial of certiorari) (detailing DOJ's "policy against intruding on state legalization schemes.").

This laissez-faire trend was further reflected in a recent White House proclamation announcing pardons for *anyone* who committed or was convicted of simple possession or use of marijuana—for medicinal purposes or otherwise. *See supra*, p.3. Accordingly, even if the government agrees that marijuana's legality in Mississippi is not controlling, its supposed illegality under federal law is not dispositive. Federal law simply does not "prohibit entirely the possession or use of marijuana." *Standing Akimbo*, 141 S.Ct. at 2236 (Thomas, J., statement respecting denial of certiorari) (cleaned up). To argue otherwise, as Defendants do, wrongly oversimplifies the *Central Hudson* inquiry.

The absence of a true federal prohibition aside, Defendants have other problems. For example, Defendants do not (because they cannot) argue that they could still censor Plaintiffs' speech on the basis of some state-law authority. Thus, Defendants apparently concede, they are unilaterally enforcing *federal* law—something they cannot do.[6] And this is something that the CSA is clear about: the CSA is "enforceable only by the Attorney General and, by delegation, the Department of Justice." *Schneller v. Crozer Chester Med. Ctr.*, 387 F. App'x. 289, 293 (3d Cir. 2010); *Safe Sts. All. v. Alt. Holistic Healing, LLC*, 2016 WL 223815, at *4 (D. Colo. Jan. 19, 2016) (same). True, that authority *has* been delegated, but to the DEA—*not* the Mississippi Department of Health. *See* 28 C.F.R. § 0.100(b) (assigning to the DEA the AG's power to enforce the CSA).

[6] *See* 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. Rev. 698, 708 (2011) ("States have no inherent power to enforce federal statutory law.").

But what Defendants are doing is worse than attempting to enforce *federal* regulations. Rather, Defendants are creating their *own* regulations, which they seemingly concede they lack the state-law authority to create, and they are relying on a federal law that they cannot enforce as its basis. The Supreme Court has categorically rejected this type of state-law overreach, expressly because it does not want states to do exactly what Mississippi is doing here—creating and enforcing state laws on the basis of federal laws that the federal government has said it does not want to enforce. *See Arizona v. United States*, 567 U.S. 387, 402 (2012) (holding, in the preemption context, that a state law was invalid because it would provide the state with "the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies."). In three words, "frustrat[ing] federal policies" on medical marijuana is precisely what Defendants are doing here.

Defendants' Supremacy Clause argument is similarly unhelpful. To begin with, Defendants' underlying assumption—that the CSA categorically overrides state marijuana laws—is wrong. The CSA itself expressly says that it does not preempt state law. *See* 21 U.S.C. § 903. And several state courts agree. *See Bourgoin v. Twin Rivers Paper Co.,* 187 A.3d 10, 19 (Me. 2018) (collecting cases). But even if the CSA does, as Defendants argue, "prevail[] over state law by virtue of the Supremacy Clause," that does not resolve the First Amendment question. Rather, such a holding would resolve only a statutory question that Defendants likely did not intend to introduce: whether Mississippi's *entire* medical marijuana act is illegal in light of federal law. *Raich*, a Commerce Clause case, does not change any of this. *See* Defs.' Mem. 7. All *Raich* addressed was whether state-law legality was a defense to *federal* prosecution, *see*

Gonzales v. Raich, 545 U.S. 1 (2005)—not whether a state could undermine its *own* laws by banning speech about a substance it has legalized.[7]

Laid bare, Defendants' argument asks this Court to accept a novel idea that would produce a concerning rule of law: that long-recognized constitutional rights—like First Amendment protections for commercial speech—evaporate once the government concludes someone has violated some law. But the opposite is true; even where government may restrict or prohibit certain behaviors, the Constitution still matters.[8] After all, speeding is illegal, but the government cannot violate the Constitution when enforcing speed limits. *Whren v. United States*, 517 U.S. 806, 814 (1996) (Equal Protection Clause protects speeders from discriminatory enforcement). Likewise, alcohol is a controlled substance, but the government cannot violate the constitution when regulating it—even though it does so pursuant to explicit constitutional authority. *Granholm v. Heald*, 544 U.S. 460 (2005) (Twenty-first Amendment did not excuse Commerce Clause violation). In fact, far from sacrosanct, even the Controlled Substances Act has its exceptions when important civil liberties are implicated. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (acknowledging a religious-use exception to the CSA). In sum, this Court should decline Defendants' invitation to narrow the First

[7] In any case, the holding in *Raich* is based on an obsolete federal marijuana policy—that of a "*comprehensive* regime to combat . . . traffic in illicit drugs." 545 U.S. 1, 12 (2005) (emphasis added). As Justice Thomas and others have suggested, federal policy since *Raich* was decided has "greatly undermined its reasoning." *Standing Akimbo*, 141 S. Ct. at 2236 (Thomas, J., statement respecting denial of certiorari). *Cf. United States v. Guess*, 216 F. Supp. 3d 689, 695 (E.D. Va. 2016) ("[T]he current state of the law—in which state law either legalizes or criminalizes marijuana; federal law criminalizes marijuana; and federal policy does not enforce the federal criminalization of marijuana depending on a defendant's geographic location—creates an untenable grey area in which such certainty and notice have effectively, if not formally, been eradicated.").

[8] *But see Gonzalez v. Trevino*, 42 F.4th 487, 493–94 (5th Cir. 2022) (holding that existence of probable cause defeated a claim for retaliatory arrest absent evidence of non-enforcement against similarly situated individuals). This holding is arguably in tension, however, with the Supreme Court's holding in *Lozman v. Riviera Beach*, 138 S. Ct. 1945 (2018) and the Supreme Court has granted certiorari in *Gonzalez* on this question. *See Gonzalez v. Trevino,* 144 S. Ct. 325 (Oct. 13, 2023).

Amendment's protections in a way that disregards how the courts have historically treated the interplay between the state's regulatory authority and basic civil rights.

II. THIS COURT HAS THE AUTHORITY TO ENFORCE THE CONSTITUTION.

Defendants also argue that this case should be dismissed because, were this Court to do otherwise, it would facilitate conduct violating federal law. Defs.' Mem. 9–11. Setting aside Defendants' own complicity in this supposedly illegal enterprise, that argument forgets another fact—that it is "the duty of th[e] court[s] to enforce constitutional liberties." *Milk Wagon Drivers Union of Chi., Loc. 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 299 (1941). That this case involves a state-legal medical marijuana program does not change that. Federal district courts throughout the country routinely adjudicate—and grant equitable relief on—constitutional challenges to states' regulations of their state-legal marijuana programs. *See*, *e.g.*, *Patients Grp. v. United Cannabis Patients & Caregivers of Me.*, 45 F.4th 542, 557 (1st Cir. 2022) ("[W]e do not see how it would be equitable for us to leave a dormant Commerce Clause violation unremedied if such a violation has occurred."); *Variscite NY One, Inc. v. New York*, 640 F. Supp. 3d 232 (N.D.N.Y. 2022) (granting preliminary injunction in a Dormant Commerce Clause challenge to a state-legal marijuana business licensing scheme); *Toigo v. Dep't of Health & Senior Servs.*, 549 F. Supp. 3d 985 (W.D. Mo. 2021) (same); *Lowe v. City of Detroit*, 544 F. Supp. 3d 804 (E.D. Mich. 2021) (same); *NOG, LLC v. City of Portland*, 2020 WL 4741913 (D. Me. Aug. 14, 2020) (same) (denying motion to dismiss). Even the case that Defendants insist resolves this matter, *Montana Cannabis*, was decided on its merits.[9]

[9] Indeed, if Defendants' theory were correct, *all* cases involving state-legal marijuana would be dismissed rather than decided on their merits. But that, too, is wrong. *See, e.g.*, *Ball v. Madigan*, 245 F. Supp. 3d. 1004 (N.D. Ill. 2014) (granting summary judgment for plaintiff in a First Amendment challenge to a ban on campaign contributions from medical marijuana businesses); *Sinclair v. City of Grandview*, 973 F. Supp. 2d 1234 (E.D. Wash. 2013) (granting summary judgment for defendant in Fourth Amendment challenge because plaintiff's state-legal

Given this background, it is perhaps unsurprising that at least one federal court has already rejected—in a marijuana case no less—the exact argument that Defendants make here. *Finch v. Treto*, 606 F. Supp. 3d 811, 816 (N.D. Ill. 2022). In *Finch*, as here, the defendant "argue[d] that federal courts 'cannot' use their equitable power to facilitate federally illegal conduct." *Id*. at 833; *cf.* Defs.' Mem. 9 (arguing that "[g]ranting the requested equitable relief would violate the fundamental principle that courts will not utilize their equitable powers to facilitate unlawful conduct."). The court in *Finch* rejected the defendant's argument, explaining that it makes no "equitable sense in a case like this one, where the plaintiff seeks to participate in a state-sanctioned (but federally illegal) market and the defendant has allegedly engaged in a constitutional violation in organizing that market." *Id.* at 833–34. As the court explained, both parties were "engaging with the business of distributing a controlled substance, but only one party ha[d] soiled the federal Constitution." *Id.*[10] This Court should similarly reject Defendants' argument here.

The cases cited by Defendants do not counsel otherwise. In fact, other than *In re Way to Grow, Inc.*, 597 B.R. 111 (Bankr. D. Colo. 2018) (bankruptcy), the court in *Finch* considered *each* of the cases Defendants cite here and concluded that it was "not persuaded." *Finch*, 606 F. Supp. 3d at 834 & n.23. Likewise, here, virtually all of the cases Defendants rely on do not even

possession of marijuana did not negate probable cause); *Conant v. Walter*, 309 F.3d 629 (9th Cir. 2002) (affirming summary judgment and permanent injunction for plaintiffs' First Amendment challenge to policy punishing doctors for advising patients on medical marijuana); *N. Cal. Small Bus. Assistants Inc. v. Comm'r*, 2019 WL 5423724 (T.C. Oct. 23, 2019) (considering summary judgment in an Eighth Amendment challenge to IRS's application of a provision disallowing business deductions against state-legal medical marijuana businesses).

[10] Although the court ultimately denied the preliminary injunction on other grounds, its rejection of the state's argument was left intact by the Seventh Circuit. *See Finch v. Trento*, 82 F.4th 572, 575 (7th Cir. 2023) ("We see no basis to disturb [the district court's] sensible equitable judgment.").

involve constitutional challenges.[11] *See Sensoria, LLC v. Kaweske*, 581 F. Supp. 3d 1243 (D. Colo. 2022) (securities & RICO); *Shulman v. Kaplan*, 2020 WL 7094063 (C.D. Cal. Oct. 29, 2020) (RICO); *Kiva Health Brands LLC v. Kiva Brands Inc.*, 402 F. Supp. 3d 877 (N.D. Cal. 2019) (trademark infringement); *Polk v. Gontmakher*, 2019 WL 4058970 (W.D. Wash. Aug. 28, 2019) (breach-of-contract). There is, therefore, no basis to conclude that this Court should be stripped of its equitable powers here—a case in which one party is following state law to a tee and the *other* is violating the Constitution.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied.

Dated: January 12, 2024.

Respectfully submitted,

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[11] The one constitutional case Defendants cite—*Original Invs., LLC v. Oklahoma*, 542 F. Supp. 3d 1230 (W.D. Okla. 2021)—appears to be the minority approach and has been rejected by at least one U.S. Court of Appeals. *See Patients Grp.*, 45 F.4th at 557. That case is further unpersuasive because it relies heavily on a single-judge, non-precedential opinion of the Tenth Circuit in a case that did not involve constitutional liberty claims. *Original Invs.*, 542 F. Supp. 3d at 1235–36 (relying on *Fourth Corner Credit Union v. U.S. Fed. Rsrv. Bank of Kansas City*, 861 F.3d 1052, 1053–58 (10th Cir. 2017) (Moritz, J., non-precedential opinion)).

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2024, a true and correct copy of Plaintiffs' Memorandum in Support of Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss was served via the Court's CM/ECF system upon all counsel of record.

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